87-792

No.___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM , 1987

EDEN SERVICES, FRED J. EDEN, JR.,
and J. ERIK EDEN,

Petitioners,

v.

RYKO MANUFACTURING CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that, as a matter of law, Ryko's national account program did not constitute resale price maintenance because (a) the uncontradicted evidence demonstrated that Ryko sells directly to national account customers and that, at best, Eden acts as Ryko's agent on national account sales, and (b) there was no evidence that Ryko conspired with anyone to fix resale prices.

2. Whether the per se rule should be applied to a vertical nonprice restraint where the manufacturer, who lacks any appreciable market power, performs distribution functions in some exclusive territories and distributors perform distribution functions in other exclusive territories.

RULE 28.1 STATEMENT

Pursuant to Supeme Court Rule 28.1, Ryko Manufacturing Co. states that it has one subsidiary, Ryko International Limited, and one affiliate, Business Management Technologies, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT
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Respondent, Ryko Manufacturing Co., hereby resists the petition for issuance of a writ of certiorari filed by Eden Services. This case does not present any novel or compelling

issues of antitrust law or policy and this Court's denial of certiorari would work no injustice to any party to this action. The Court of Appeals, in a unanimous opinion, rejected the arguments raised in Eden's Petition and Eden has failed to demonstrate any patent error in that opinion. Therefore, Ryko requests that the Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Eden's statement of the case and discussion of the proceedings below do not accurately reflect the condition of the record submitted to the Court of Appeals and that court's decision on appeal. Ryko notes, among others, the following significant errors in, and omissions from, Eden's statement of the case.

1. Ryko and the National Market for Car Washing Equipment. Ryko principally manufactures an automatic rollover car wash machine which competes with three other types of car wash equipment—tunnels, drive-thrus, and hand-held or wand—in a national market for car wash equipment. The jury in this case found that these four types of equipment compete with one another and together comprise the relevant product market. The evidence on the market share issue showed that Ryko possessed between 8%-10% of this car wash market, that there are over 60 manufacturers of car wash equipment in the United States, and that there are no substantial barriers to entry into the market. Tr. 1988, 2066; Ex. 92

Ryko is a small, closely-held corporation formed under Iowa law and which began its existence in April of 1973 out of a three-car garage in Bondurant, Iowa. Tr.73-74. Ryko's

success as a manufacturer and seller of car wash equipment is in large part attributable to the determination of its founders, Jim Nelson and Larry Klein, in designing a car wash capable of thousands of washes with a low breakdown rate and developing a strong and effective sales and service system. Tr. 83-88.

2. Ryko's Distribution System. Ryko distributes its car wash equipment and accessories through two channels—by direct sales to national account program customers and to its distributors for their resale. Tr. 85-88; 107-16; Ex. K. Two different sets of commercial documentation were designed to facilitate sales on the different transactions. Ryko's sales to national account customers were accomplished by the national account customer's issuance of a purchase order directly to Ryko, the receipt of which caused Ryko to construct the car wash machine.Tr. 164-8; 1602-3. Ryko submits the bill to and is paid by the national account customer after the machine is constructed, shipped and installed.Tr.164-71. On sight draft sales, Ryko's distributors send an order for equipment with a deposit to Ryko. Ryko then ships the equipment to the location designated on the order but the equipment cannot be unloaded until the sight draft has been honored. Tr.159-63; 1945.

The national account program was established by Ryko to stimulate sales of its car washing equipment in a very competitive market.[1] The national account customers, whose number has remained at 17 throughout the years, are principally national oil companies. Ex. 70, 78, 79, 80. Ryko's national account program has proven to be a successful tool for

[1]Judge Bowman, writing for the Court of Appeals in this case, carefully reviewed the operation of Ryko's national account program and the fundamental, yet distinguishing, characteristics of sight draft resales of equipment by Ryko's distributors. Pet. App. 3a-7a.

marketing car wash equipment to the oil industry and other large volume purchasers crossing distributors' territories, and, indeed, national account programs are utilized by other car wash equipment manufacturers. Tr. 1948. The program is useful in promoting price competition against other car wash equipment manufacturers because the oil companies purchase in quantity, either on a series or a single transaction basis, and they demand discounts. Tr. 80-8; 1050-69. Moreover, the national oil companies often required their vendors to offer national account programs because of the substantial involvement of the national or regional office in purchase and location of car wash equipment for their dealers throughout the country.[2]

Ryko has a network of distributors throughout the United States, but Ryko performs distribution activities in several territories with company employees. Ryko distributes directly in those territories for a couple of reasons: In some territories, like Iowa, Ryko has always performed distribution activities. In other territories, Ryko performs distribution activities because the distributors have quit or have been terminated for poor performance or have wished to be company employees, and Ryko has not found another distributors to service the area or has chosen not to replace those distributorships. Tr. 191-7. Ryko, however, at an early point,

[2]The large oil companies make purchasing decisions nationally or regionally. Tr. 677-86; 1046-54. These companies often own and lease or own and operate gasoline stations and they therefore have a significant interest in the types of materials, supplies and equipment used at or installed in their stations. The national oil companies have insisted on taking an active part in decisions regarding the types of supplies and equipment sold in those stations. Tr. 80-2; 683-6. These companies, through their national and regional offices, review and test available car wash equipment for installation at their stations. The companies often provide incentive and financing programs for the purchase of car wash equipment from approved suppliers and utilize their volume buying power to obtain discounts on such purchases. Tr. 1050-69.

determined that exclusive territorial arrangements are necessary to enable Ryko to compete more effectively against other car wash equipment manufacturers, and Ryko has implemented exclusive territories for its distributors. Ryko's employee-run territories are also subject to the territorial arrangements imposed on Ryko's distributors.

3. The Eden Services' Problem. Fred Eden became a Ryko distributor in 1977 and signed a standard distribution agreement granting him an exclusive territory in Washington D.C. and the State of Maryland. Over the years Eden has been an average (or at times, below average) distributor in terms of sales of equipment. Eden wanted to provide installation and maintenance service in the adjacent northern Virginia area, and, at Ryko's suggestion, an arrangment was worked out with the Virginia distributor.Tr. 707-9. Later, the Virginia distributor was terminated for poor performance and, when Ryko took over the territory, Eden insisted that it be given the northern Virginia territory. Ryko instead permitted Eden to service the northern Virginia area on an "as needed basis." Ex.8. However, Eden continued to dispute its right to exercise full distributorship rights in that area and the dispute precipitated hard feelings between Ryko officials and the Edens. Eventually, the contract dispute over distributorship rights to northern Virginia led to this action.

For several years, beginning in the late 1970's, Eden was toying with a water reclaim system applied to car wash equipment applications. Eden was marketing a jury-rigged Culligan water purification system and had discussed the possibility with Ryko of developing a total water reclaim system. Tr. 1468-69. At that time Ryko was developing such a system, which was completed in 1978. It was not until three years later, in 1981, that Eden completed its own reclaim system,Tr. 1345-8, and that is when the rub began. Ryko

requires its distributors to exclusively market only Ryko equipment and not distribute any competitive product. Eden was refusing to promote Ryko's reclaim and instead was promoting its own reclaim.

The parties finally reached an impasse when Eden, in direct contravention of the distributorship agreement, attempted to make a direct sale to a national account customer on an installation in northern Virginia and the proposal featured the Eden reclaim rather than the Ryko reclaim.[3] Ryko sought a declaratory judgment on the rights and duties imposed on Ryko and Eden pursuant to the agreement. Nearly a year later, Ryko attempted to terminated Eden as a distributor after it was discovered that Eden had been promoting rollover car washing equipment manufactured by a competitor, Bivens-Winchester, and after Fred Eden, a lawyer by training, lied under oath on two occasions that Eden never attempted to sell competitive equipment.

4. The Court of Appeals found, as a matter of law, that Ryko has not violated the federal antitrust laws. In its Statement of the Case, Eden contends that the Court of Appeals engaged in "extensive appellate fact-finding" but that its petition would address the legal implications of the decision. Petition at 6. Eden then spends the following three pages disputing largely factual matters found by the court of appeals. Ryko will respond to those factual arguments in the Argument section of this Brief in Opposition.

The Court of Appeals, in a unanimous opinion, agreed

[3]Eden's petition portrays the reason for its dismissal as stemming from Eden's price discounting on the Crown McLean transaction. Pet. at p. 5, 21. The uncontradicted evidence, however, shows that Eden was not terminated until one year after the Crown McLean transaction occured, that Ryko never complained to Eden about price discounting, and that the reasons for termination were, for the most part, Eden's sales of competitive equipment. Ex. 61.

with Ryko that neither its national account program nor its distributors' direct sales consituted resale price maintenance agreements. The court's multi-faceted holding concluded that Ryko's distributors were agents on national account transactions, that Ryko made sales directly to national account customers and there was no sale by Ryko followed by any conditioned or coerced resale by the distributor, and that there was an absence of any evidence that Ryko agreed or conspired with its distributors to fix resale prices.

The Court of Appeals also agreed with Ryko that its exclusive territorial provision was a reasonable restraint because Eden had failed to demonstrate any adverse effect on interbrand competition. The only evidence concerning potential competitive impacts was uncontradicted testimony that Ryko had about 8% to 10% of the market for car wash equipment. The Court of Appeals held, as a matter of law, that Ryko held an insufficient market share to demonstrate an adverse effect on interbrand competition.

The Court of Appeals also affirmed the district court's conclusion in this case that the territorial restraint employed by Ryko, which Eden contended was an illegal dual distribution arrangement, should be subjected to a rule of reason analysis. The Court of Appeals held that, even viewing the case as a situation involving dual distribution, there was no evidence of a dealer's cartel or other horizontal conspiracy which would warrant invocation of the per se rule.[4]

[4]The Court of Appeals, in concluding that the district court had failed to perform responsibly it duties in reviewing Ryko's motions for judgment nov and for new trial, also reversed the tying arrangement and exclusive dealing arrangement verdicts. Pet. App. at 38a, 40a. The appellate court sent back for a new trial some of Eden's breach of contract and fraud claims. Pet. App. 45a, 48a.

REASONS THE PETITION SHOULD BE DENIED

There are several important reasons why Eden's Petition should not be granted. In the first place, the Petition does not present any important issues of antitrust law or policy. The appellate court's opinion shows that the court performed precisely the type of analysis required by this Court decision in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). The Court of Appeals carefully sorted out the parties' arguments and examined in depth the real factual differences between purchase order transactions and sight draft transactions and between sales to national account customers and sales by distributors. From its analysis, the court drew real distinctions based upon uncontradicted facts in the record, and correctly concluded that Ryko had not engaged in resale price maintenance on any transactions.

The Court of Appeals conclusion that Ryko and its distributor could not, as a matter of law, agree or conspire to fix resale prices is not discordant with the decision of any other court. The court merely reaffirmed a longstanding rule that agents, like other employees, cannot conspire with their principals under section 1 of the Sherman Act. Moreover, the court correctly determined that there was no evidence that Ryko and its distributors agreed on any resale prices. In other words, the court's rulings on these points were neither novel nor in conflict with decisions in other circuits.

Finally, it is hardly surprising that the Court of Appeals refused to disturb this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), by ruling that dual distribution arrangements are per se illegal. There is a long and unvarying line of cases which hold that vertical non-price restraints imposed by a manufacturer, and which

are or resemble dual distribution arrangements, must be analyzed under the rule of reason, unless there is evidence of a dealers' cartel. These cases are rooted in the Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc,* and Eden has been unable to articulate a cogent necessity for reveiw.

ARGUMENTS

I. Neither Ryko's National Account Program Nor its Distributors' Sight Draft Sales Constitute Resale Price Maintenance

This case presents no issues governed by the Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Rather, Eden has attempted to create a conflict which does not exist. More importantly, the Court of Appeals properly applied the analysis required by this Court in the *Simpson* case in addressing Eden's claims that Ryko engaged in resale price maintenance.

A. The Intra-Enterprise Conspiracy Doctrine Does Not Conflict with the Court of Appeals' Ruling

Eden contends that the Court of Appeals mistakenly relied on *Copperweld* in holding that Eden's status as an agent for Ryko on sales to national account customers was incapable of conspiring with Ryko. Petition at 13. Eden claims that *Copperweld* was expressly limited to alleged conspiracies between parent corporations and wholly owned subsidiaries, and that the lower court's holding was in conflict with two other appellate court decisions. *Id.* at 14. Eden, however, reads both the *Copperweld* decision and the Court of Appeals' decision too narrowly. When properly read, there is no conflict between those decisions.

In *Copperweld* the Court recognized the rule that a corporation cannot conspire with its employees, officers and

directors. 467 U.S. at 769. As the Court noted, that rule has a long and uninterrupted history in the federal courts and its origin lies in the Sherman Act's proscription against combinations and agreements between two or more legally distinct "persons." *Id.* at n. 15 (collecting cases). The Court went on to decide whether a wholly owned subsidiary was capable of conspiring under the antitrust laws with its parent corporation.

The courts have recognized a limited exception to the rule that officers, directors and employees lack capacity to conspire with their corporation. Thus, an officer or agent's may have legal capacity to conspire with the corporation when the agent acts outside the scope of his or her authority as an officer or employee engages in anticompetitive conduct for his or her personal benefit. *See,e.g., Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 (8th Cir. 1986); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1028-31 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979). This exception explains the cases cited by Eden as being in conflict with the Court of Appeals' decision. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 880 (1987), the court held that Atlas and several of its carrier agents, who were also members of Atlas' board of directors and actual or potential competitors, were capable of conspiring with Atlas, notwithstanding the agency relationship, because each agent possessed "an 'indispensible personal stake in achieving the corporations's illegal objective'." *Id.* at 213, *quoting Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974). Similarly, in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986), the court held that the *Copperweld* rationale was inapplicable to a claim that a group of agents, acting together with the corporate principal, formulated a

horizontal conspiracy to fix prices and restrain competition.

In this case, the *Copperweld* decision was not even cited, much less applied, by the Court of Appeals. Moreover, it is clear that the lower court properly relied upon, and correctly applied, the consistently recognized rule that an agent lacks legal capacity under section 1 of the Sherman Act to conspire with its corporate principal.

B. The Court of Appeals Properly Rejected Eden's Formalistic Argument in Concluding that Eden Was an Agent on Sales to National Account Customers

Eden attacks the Court of Appeals' decision on another front, and argues that the court "turned *Simpson* on its head" and "failed to appreciate the central lesson of *Simpson*." Petition at 15,17. It is Eden, however, which fails to appreciate the lessons of, and the analysis required by, the *Simpson* decision, and it is equally clear that Eden's petition simply disagrees with the Court of Appeals' conclusion that Eden failed to present sufficient evidence to support its resale price maintenance claim.[5]

Eden's petition suggests that *Simpson's* proscription against resale price maintenance has some kind of special application to national account programs and cites to a few cases which have found resale price maintenance in the context of national account programs. Petition at 12. There

[5]Eden argues that the Court's decision in *United States v. General Electric Co.*, 272 U.S. 476 (1926) was effectively overruled in the *Simpson* case, and that the Court of Appeals' off-hand statement that *Simpson* "did not overrule *General Electric*" implies great significance to the Court of Appeals' handling of this case. Petition at pp. 14-15. Whether or not *Simpson* overruled General Electric is largely an academic "tempest in a teapot" and is not particularily important to the proper resolution of this litigation or to antitrust law generally. More importantly, irrespective of the Court of Appeals' reference to *General Electric*, it is clear that the court capably performed the analysis required by *Simpson*.

are, however, many cases in which the courts have found that national account programs do not constitute resale price maintenance, and in each case the court has performed the type of analysis required by *Simpson*. *See, e.g., Mesirow v. Pepperidge Farms, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836 (1979); *Pogue v. International Industries, Inc.*, 524 F.2d 342 (6th Cir. 1975). The Court of Appeals in this case, relying on those cases, performed the analysis required by *Simpson* and concluded that Eden's agency status precluded a finding that Ryko engaged in resale price maintenance.

In conducting the type of analysis required by the Court's decision in *Simpson*, the Court of Appeals closely examined the evidence presented at trial and the legal conclusions which followed uncontradicted facts in the record. In the first place, the court recognized that Eden's allegations of price fixing were limited to sales to national account customers; therefore, the court separately applied the *Simpson* reasoning to purchase order sales and to sight draft sales. Drawing this practical and realistic distinction is important, not only because it comports precisely with the realities of market transactions but also because Eden has consistently failed to recognize the instrumental significance of the two different types of transactions.

On purchase order transactions, the Court of Appeals examined many more factors than the three identified in Eden's petition[6] and found that those sales were made by Ryko

[6]Eden states that the Court of Appeal "highlighted" the fact that Eden did not warehouse machines, did not extend credit to national account customers, and that Ryko billed national account customers. Petition at 16. The court, however,considered other factors, including transportation responsibilities, allocation of risks between Ryko and its distributors, national promotional and marketing activities, and others. Eden's complaint merely

and not by Eden, and that Eden participated in no significant way as an agent. The conclusion that Eden functioned as an agent on national account sales is based upon uncontroverted facts in the record. First of all, the prices and terms of trade for car wash equipment were negotiated directly between Ryko and the national account customer's national or regional staff. Tr. 228-40; 260-5; 677-85; 1055. Eden did not participate in reaching either the price or terms of those sales. Second, machines were ordered directly from Ryko through purchase orders and the machines were shipped directly to the national customer at the receiving point designated by the customer. Tr. 235-42; 164-71; 452-3. In other words, Eden never had possession to the goods. Third, the machines were shipped FOB Des Moines, which means that title passed directly to the customer at the point were Ryko delivered the goods for transportation. Tr. 419. In other words, Eden never held title to the goods. Fourth, Ryko bore all of the risk that the customer would cancel the order for machines or that the machines would be damaged before shipment or installation. Tr. 164-71; 235-6. Eden never was at risk to any extent on those transactions. Fifth, Ryko sought "approved supplier" status from the national accounts, advertised Ryko products nationwide, solicited sales from national account customer, arranged for equipment to be used on a test basis by national account customers, and arranged for national customers to view Ryko products in operation prior to purchase. Tr. 231-4; 432-4. Finally, and most importantly, Ryko actively promoted and marketed its products to the national oil compa-

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underscores what is involved in this petition: Eden failed to produce real evidence that tends to show that Ryko coerced its distributors to resell Ryko car wash machines at prices dictated by Ryko.

nies and other national account customers.[7]

Contrary to Eden's contention to this Court, the Court of Appeals did not unfairly diminish Eden's risk taking on purchase order sales, nor did the court usurp the responsibility of the jury. It was clear on the record in this case that Eden had no significant risk taking on purchase order transactions to warrant a finding that they acted as independent business entities in making sales to national account customers. Eden's lack of any significant risk-taking also distinguishes Eden's situation from the distributor in *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), a case greatly touted by Eden. Unlike the uncontradicted evidence in this case, the supplier-distributor relationship between Greene and General Foods showed that there was a sale of goods by General Foods and a subsequent resale by Greene. 517 F.2d at 640. The supplier, as a part of the distributorship agreement, gave price lists which Greene was told to resell the goods for. *Id.* It was not disputed that Greene owned and held title to the goods. 517 F.2d at 641. The court also found that Greene stored the goods at his risk of loss and that the supplier had no appreciable risks in the transactions. *Id.* On these facts alone, the *Greene* case could not be more unlike this case, and the Court of Appeals clearly

[7]The national account sales were made as a result of continuous sales, promotional and advertising efforts by Ryko's Larry Klein and the sales force at Ryko. Ryko personnel attended trade shows, demonstrated equipment and transported customers to view Ryko equipment. Tr. 1972-6. Klein and other Ryko personnel routinely called on national account customer procurement personnel to promote Ryko products, iron out difficulties, and negotiate sales and buyer discounts. Tr. 187-8; 228-9; 677-86. Klein developed close contacts with national account customers by frequent visits to national and regional headquarters, arranging for product tests, and seeking to have Ryko placed on approved supplier lists. Tr. 964-6. Ryko also maintained a number of factory representatives who were spread out in geographic regions and who maintained contacts with regional or local offices of national account customers, promoted Ryko products, and assisted Ryko distributors in promoting and servicing Ryko products. Tr. 836-7.

did not err in concluding that Eden's was not an independent business entity on Ryko's purchase order sales to national account customers.[8]

Eden also claims that it proved resale price maintenance on eight transactions involving sales by sight draft to national account customers. Petition at pp. 4-5 & n.l. Eden made a similar argument to the Court of Appeals, which rejected the argument by concluding that the evidence did not, on its face, support Eden's claim.[9] First, the Court of Appeals found that because the sales were made by sight drafts they were not in fact national account sales. Pet. App. 22a. Therefore, the sales could have been made by Eden at any price it could obtain in the market. Further, the transactions did not involve sales to national customers; rather, the customers were local dealers who were making the car wash equipment purchases on their own account. Pet. App. 22a & n. 7. Most important, however, was the evidence that on several of these transactions, there were price quotations from Eden Services offering a discount off of national account

[8]Eden also relies on *Bostick Oil Co. v. Michelin Tire Co.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983), for the proposition that mandatory national account programs are illegal resale price maintenance. Petition at p. 15. In *Bostick Oil Co.*, however, the tire manufacturer sold the product to its distributors, including the plaintiff, and then attempted to condition the price at which the distributors resold the product. 702 F.2d 1211-12. In this case, because of the agency relationship between Ryko and Eden, there was no sale to Eden and no attempt by Ryko to coerce Eden into reselling machines at a specified price. Rather, as the Court of Appeals correctly concluded, the purchase order transactions involved sales and purchases directly between Ryko and the national account customers. Pet. App. 18a.

[9]In the Court of Appeals, Eden pointed to 19 transactions in which it claims to have made a resale which was subject to a price fixing arrangement. In this Court, Eden has narrowed the scope of its argument to 8 transactions in which it claims Ryko fixed resale prices. It is clear, however, that the Court of Appeals carefully reviewed all 19 transactions, including the 8 submitted to this Court to demonstrate appellate error, and concluded that they failed to present a jury issue on the presence of any price fixing scheme by Ryko. Pet. App. 20a-22a & nn. 6-7.

price. Ex. 93, V-7, W-7.[10] These sight draft transactions do not demonstrate a resale price maintenance arrangement by Ryko, and the Court of Appeals did not err in concluding that Eden produced insufficient evidence of any price fixing scheme.[11]

The Court of Appeals, after a careful consideration of the evidence presented at trial, was justified in concluding that Eden did not engage in sufficiently independent entrepreneurial activities on any transactions with national account customers to support a claim that Eden was not an agent. Rather the evidence clearly predominates in support of the finding that Eden functioned as an agent on those trans-

[10]In Appendix A to this Brief in Opposition, Ryko is including Ex. 93, a bid from Eden Services to Scott Trennor, a Jiffy Lube franchisee. This transaction relates to exhibits V-7 and W-7 cited by Eden as "completed national account sales" and introduced to show a resale price maintenance scheme. The Court should note: (1) that the transactions are not sales to a national account customer; it proposes sales to a franchisee of a national account customer; (2) that the "arrangements for the purchase are to be made by [Eden Services], rather than through Jiffy Lube, International"; (3) that the sale is accomplished by sight draft and not by purchase order; (4) that Eden was proposing a healthy discount off list price; and (5) that Eden was promoting its own reclaim system rather than Ryko's reclaim. Eden fails in its Petition to explain either how these transactions can be construed as evidence of a price fixing scheme or how competition policy is advanced by Eden's behavior.

[11]Eden's claim that the exhibits listed in footnote 1, pages 4-5 of the Petition show "completed national account sales" is simply not true. None of those exhibits shows a sale to a national account customer and none of the exhibits even shows the resale price charged the customer. Each exhibit is an invoice showing a sale to Eden, a shipment to a customer and Eden's equipment cost. One exhibit represents a sale by Eden to George Smith, Ex. G-6 and Tr. 1182, another represents a sale to Bob Christ Amoco, Ex. L-7, and a couple more represent sales to Scott Trennor, V-7 and W-7. Eden does not explain how these sales represent sales to national account customers. Indeed, Erik Eden testified to the difference between sales to a Jiffy Lube franchisee, such as Trennor, and a sale to Jiffy Lube, International, which was the national account customer for a while. Tr. 1416. The Court of Appeals was certainly justified in rejecting Eden's shifting and indistinct argument that these sight draft transactions were really the product of a resale price maintenance arrangement.

actions. The court's analysis follows the analysis required by *Simpson*. *See, e.g.*, *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313 (8th Cir. 1986); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983). *See generally*, VII Areeda, *Antitrust Law* ¶ 1473 (1986).

Perhaps the most compelling reason for denying Eden's petition for a writ of certiorari is the absence of any evidence that Ryko suggested, fixed, coerced or regulated in any way the resale prices for its equipment. The Court of Appeals held that Eden failed to sustain its burden of "'present[ing] direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Pet. App. at 22a, *quoting Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Eden does not contend that this appellate finding is erroneous, and, even if the Court of Appeals erred in concluding that Eden was an agent on Ryko's national account sales, there is no evidence that Ryko fixed any resale prices. Pet. App. 22a-27a.

II. The Per Se Rule is Not Applicable to Ryko's Exclusive Territorial Arrangement

Eden also contends that Ryko's exclusive territorial provisions, which assign geographic areas to distributors, become a horizontal market allocation, and therefore per se illegal, merely because Ryko performs distribution activities in some territories. The Court of Appeals properly rejected Eden's argument because it comports with neither the facts of the case nor the prevailing case law. Pet. App. 28a-31a. There are ample reasons for rejecting Eden's argument.

First, all of the cases involving similar restraints

which have been decided since the Court's decision in *Contintental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) have held that the restraint should be characterized as a vertical nonprice restraint and apply the rule of reason. *See, e.g., Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986), *modified on other grounds,* 810 F.2d 1517 (9th Cir. 1987); *Abadir & Co. v. First Mississippi Corp.*, 651 F. 2d 422 (5th Cir. 1981). These rulings advance this Court's frequently stated admonition that commercial behavior should not be included in the category of per se offenses unless it becomes clear that the behavior "facially appears to be one that would always or almost always tend to restrict competition and decrease output. . ." *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 8-9 (1979). Ryko's internal operation of a handful of territories does not meet such a stringent standard for presumptive illegality.[12]

More fundamentally, Eden has failed to demonstrate any anticompetitive harm accompanying Ryko's operation of those territories and, in particular, to show that the effect is any different than the restriction of intrabrand competition accompanying the exclusive territorial arrangement. Ryko imposed the exclusive territorial arrangement on its distributors to compete more effectively against other car wash equipment manufacturers, Tr. 2082, and the exclusivity provisions operated against both distributors and Ryko employees. Therefore, there is no loss to intrabrand competition occasioned by the policy. Eden complains that it could not

[12]As pointed out in Eden's petition, there have been no decisions handed down since the *GTE Sylvania* case in which a court has applied the per se rule to a dual distribution arrangement. Petition at p. 19. This uniform trend reflects the importance of the judicial characterization of these restraints as vertical nonprice restraints rather than horizontal restraints. *See, e.g., H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 245-46 (5th Cir. 1978).

sell in Virginia after that territory was operated by Ryko employees; but the converse is true and the Ryko employees in Virginia cannot sell in Eden's territory. Thus, although there is still no intrabrand competition in either territory, *GTE Sylvania* requires a consideration of the effect on interbrand competition and Eden has failed to present any evidence of an adverse effect on interbrand competition stemming from the territorial arrangement. Indeed, Eden has not even appealed from the Court of Appeals decision that the territorial arrangement is not unreasonable.

It is also clear on the record in this case that Eden had no evidence of any horizontal agreement between Ryko and its distributors to allocate territories. A horizontal agreement to divide territories is necessary to invoke the per se rule. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). In this case Eden has conceded that the territorial provision in Ryko's distributorship contracts was "imposed on distributors by Ryko" and was not "the result of a distributors' cartel." Joint Appendix 335. Obviously, there is no horizontal agreement to divide territories.

Finally, Eden's citation to the Court's decision in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) is perplexing. The issue in that case was "a narrow one of statutory interpretation" concerning the McGuire Act's exemption of certain price fixing agreements from the antitrust laws. 351 U.S. at 308-12. Not surprisingly, the Court held that the McGuire Act did not protect horizontal price fixing agreements. *Id.* at 313-14. In this case, as previously pointed out, Eden has conceded that there is no horizontal agreement to allocate territories and the *McKesson & Robbins, Inc.* case, which did not involve any nonprice restraints, provides no guidance in this case. *Cf.* Steuer, *Beyond* Sylvania: *Reason Returns to Vertical Restraints*, 47 Antitrust

L.J. 1007, 1017-20 (1978-79). Further, the so-called "fiction that Ryko acts only as a manufacturer when it agrees with other distributors to have exclusive territories", Petition at 20, is simply the result of the pragmatic analysis required by the Court in *GTE Sylvania. See Illinois Corporate Travel, Inc.*, 806 F.2d at 726. Again, there is no substance to Eden's claim of error in the Court of Appeals' decision and the evidence does not support Eden's arguments to this Court.

Conclusion

For the abovestated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 16, 1987

Appendix

EDEN SERVICES
2515 CHEROKEE STREET
ADELPHI, MARYLAND 20783

301 439-5566

September 24. 1982

Mr. Scott Trennor
Scott Lube, Inc.
8939 Tamar Drive
Columbia, Maryland 21045

Dear Scott,

Thanks very much for the down payment totalling $4,500 on the RYKO and E/S equipment for the Lanham Jiffy Lube store.

The following are summaries of the orders and prices for Lanham and District Heights:

LANHAM

Scott Lube, Inc., T/A Jiffy Lube
7571 Annapolis Road
Lanham, Mayland

RYKO $-785-2, 3 phase, 7 brush machine	$ 21, 500.00
UL equipment package	400.00
Select-A-Cycle option	606.00
Coin Box (Tokens and coins)	795.00
Token Supply (1,000)	189.00
RYKO Rinse-Off (5 gal.)	62.50
RYKO detergent (5 gal.)	35.00
Sub Total	$ 23,587.50
Maryland Sales Tax	1,179.38
Freight	700.00
Installation	900.00
Total	$ 26,366.88
E/S Water Recirculation System	$ 8,500.00

DISTRICT HEIGHTS

Robin Automotive, Inc., T/A Jiffy Lube
5917 Silver Hill Road
District Heights, Maryland 20747

RYKO R-784-2, 3 phase, 7 brush machine	$ 21,500.00
UL equipment package	400.00
Select-A-Cycle option	606.00
Coin Box (Tokens and coins)	795.00
Sub Total	$ 23,301.00
Maryland Sales Tax	1,165.05
Freight	700.00
Installation	900.00
Total RYKO Equipment	$ 26,066.05
E/S Water Recirculation System	$ 8,500.00

Please note that in consideration of your agreement to purchase more than one of our machines we have given you our most favorable price, which represents discounts of $2,400 on the machinery and $1,100 on the installation on each machine, or a total of $7,000 below retail overall.

We have also confirmed that all arrangements for the purchase are to be made by us, rather than through Jiffy Lube, International. This means that we will need to establish a payment schedule that will coincide with our obligations to RYKO, or a down payment at the time an order is placed, with the balance due on a sight draft at the time shipment, as well as a schedule covering the water system. The sight draft is a security arrangement whereby the original bill of lading, together with an invoice, is sent by RYKO's bank to our bank and the bill of lading is not released to us until the invoice is paid by our bank to RYKO's bank. Thus, we will need to deposit payment by you into our bank in time to meet the sight draft requirement. As to the water system, down payment would normally be made at the time we deliver the first equipment to the job(ie. pit cover frame and lids), with the balance due upon installation.

Since we are kind of in the midst of all of the deadlines, I have made up a table showing the various payments and due dates

involved so that we can all keep straight on the figures and where we stand. The Lanham machine is en route and we hope to off-load it Wednesday afternoon or Thursday mornig (9/29 or 9/30); the District Heights machine will be shipped, if the schedule at RYKO holds up, on October 7,1982. The table is as follows:

LANHAM	RYKO Equipment	E/S Sytem	Total
Purchase price	$26, 388.88	$ 8,500.00	$34,866.88
Down payments received	2,250.00	2,250.00	4,500.00
Balances due	$24,1T6.88	$ 6,250.00	$30,366.88
Payments due:			
9-27-82 to cover sight draft	24,116.88		
On Installation		6,250.00	$30,366.88
DISTRICT HEIGHTS			
Purchase price	$26,066.05	$ 8,500.00	$34,566.05
Down payments due:			
10-1-82	2,250.00	2,250.00	4,500.00
Balances	$23,816.05	$ 6,250.00	$30,066.05
Due on or after 10-7-82, upon notice from E/S	23,816.05		
Due upon installation		6,250.00	$30,066.05

I would appreciate it if you would sign a copy of this memorandum and return it to us for our records.

If there are any qudstions about any of the above, please call us.

Acknowledged:

Sincerely,

S Fred J. Eden, Jr.

Scott Trennor
Scott Lube, Inc.
Robin Automotive, Inc.

Fred J. Eden, Jr.
EDEN SERVICES

ps. I am enclosing a copy of a recent letter to Ray Cunningham of Jiffy Lube which is self explanatory and covers the scope of our work on the water system and the RYKO installation as well as pricing information and some figures we have developed concerning the efficiency of the water system.